IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74- 1649

UNITED STATES OF AMERICA *ex rel.* MARTIN SOSTRE,

Petitioner,

—against—

FRANK M. FESTA, Superintendent of Erie County Jail; and ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

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No. 74-

UNITED STATES OF AMERICA ex rel.
MARTIN SOSTRE,

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-against-

FRANK M. FESTA, Superintendent of Erie County Jail; and ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

Citations to Opinions Below

The opinion of the Court of Appeals is not yet reported, but appears in the Appendix. The opinion of the District Court for the Western District of New York is reported at 373 F. Supp. 133, and appears in the Appendix.

Jurisdiction

The judgment of the Court of Appeals was made on March 31, 1975, and this petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), this being a civil matter originating in federal court.

Questions Presented

Is it a denial of due process of law to refuse a writ of habeas corpus granting a new trial when the major witness in a state prosecution confesses perjury, and adheres to his recantation at a hearing?

Is it a denial of due process of law for the court to hold that promises made to and favors done for the major prosecution witness have no effect on his veracity?

Statement of the Case

This petition seeks review of the decision of the Second Circuit Court of Appeals, denying a petition for a writ of habeas corpus pursuant to Title 28 U.S.C. §2254.

Martin Sostre, a political radical with a criminal record chiefly relating to drugs, was the proprietor of the Afro-Asian Bookstore in the City of Buffalo, New York, from about January 1965 to the middle of July 1967. The bookstore, located in the black ghetto of the city, featured books of a political nature -- third world literature, as the Petitioner himself described it (App. p. 3A) and was intended by Mr. Sostre to function as a community center. Mr. Sostre was sometimes asked informally to watch over property

and at one time Arto Williams, whom Sostre knew as an addict from the neighborhood, asked him to keep a suit for a short time (App. p. 7A fn. 6).

Early in the morning of July 15, 1967, Martin Sostre was arrested in his bookstore, together with a co-worker, and was subsequently indicted for sale and possession of heroin and felonious assault. The police made great claims for the arrest of Mr. Sostre, attributing to him a major role in the riots of the spring. (See testimony of Frank Felicetta, former Police Commissioner of Buffalo, Hearings of the Committee on Un-American Activities of the House of Representatives, 90th Congress, 2nd Session, Part V [Buffalo], pp. 2017 et seq.)

Mr. Sostre was tried in March 1968 in Erie County Court without counsel, was found guilty of those crimes and of contempt of court, and sentenced to consecutive terms totalling from 30 to 41 years. Of these sentences, the largest portion, 25 to 30 years, was imposed as a penalty for the conviction on the sale of heroin.* For that charge, the chief witness was Arto Williams, who has recanted his testimony in the present proceeding and now states that he lied at the 1968 trial. Mr. Sostre declined to cross-examine Arto Williams at his trial, as he did all other witnesses, upon the ground that the proceeding was a "frame up" (App. p. 4A).

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*Mr. Sostre's conviction was on appeal at the time of the hearing of this petition. The Appellate Division, Fourth Department, made the sentences concurrent, so that the sentences now total 25-30 years. 42 A.D. 2d 1044 (1973). A judge of the Court of Appeals of New York denied leave to appeal.

After Mr. Sostre's trial, Arto Williams made his way to California, where he eventually was to join a therapeutic group for rehabilitation of drug addicts called Tuum Est (App. p. 5A). The history of the present proceeding begins at that juncture, when Arto Williams decided to tell the group that he had lied about the sale of the drugs by Martin Sostre, and after more discussion, to write a letter to Judge Constance Baker Motley. The fears expressed in a letter of September, 1970 (App. p. 11A) indicate that his false testimony had been torturing his conscience for some months. From the time he first made that confession he has never withdrawn his recantation. In April of 1971, Arto Williams gave an affidavit to one of Mr. Sostre's attorneys (App. p. 5A) and the District Court recounted the next few steps (App. pp. 19A-20A):

> Because Williams resided in California and refused to voluntarily come to New York State, and because the state court was without the power to obtain his attendance by subpoena or order, Sostre was unable to secure the attendance of Williams at a hearing on his coram nobis application. Thus, based on Sostre's inability to produce Williams, the application for a writ of error coram nobis was denied on March 30, 1972. On that same day, petitioner filed this application for a writ of habeas corpus. Petitioner has not appealed the dismissal of the state coram nobis application, but counsel have stipulated that the absence of any provision under state law to secure the attendance of Williams as a witness in the state court proceeding would make any such appeal futile.

Conversely, there was a procedure under federal law for bringing Mr. Williams to a federal district in the State of New York. A writ of habeas corpus ad testificandum was issued in the Western District of New York, at Buffalo, and Mr. Williams was brought to a hearing there.

In his testimony in this proceeding, Arto Williams developed the facts leading up to Mr. Sostre's arrest. Mr. Williams testified that he was arrested in Buffalo in June 1967 for a felony charge, at a time when he already had a felony record (App. p. 5A). He wrote to the Buffalo Police Department, a letter the exact contents of which he could not recall, and which a subpoena failed to produce, but which apparently sought to make him an informer (App. p. 5A). Alvin Gristmacher, then an officer with the Buffalo Police Department, came to see Williams in jail. Williams' account of the conversation was (T. 27-280)*:

> "He asked me did I know anyone selling drugs in the Buffalo area. I told him I did. I named a few people off to him and he didn't seem interested in those. He mentioned Martin Sostre and asked me was I familiar with him and I said 'Yes, I am', and he said, 'Do you know whether he is selling drugs', something to that effect, you know, something like that.
>
> ". . .he asked me did I know Martin Sostre was selling drugs and I thought about it for a while and I said, 'Yes', and he said, 'Well, we are very interested in Sostre because we believe that he was the cause of the riot at the time in '67'."

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*References to the Transcript of the hearing in the District Court are in the form "T.___".

Williams fell in with the idea and agreed to cooperate in order to get out of jail. Williams' letter of September 13, 1970, apparently written to his California probation officer (App. p. 11A) partly corroborated this account.

About a week later, Officer Gristmacher returned with Michael Amico, then chief of the narcotics division. A similar conversation was held, and neither Amico nor Gristmacher ever mentioned anyone besides Martin Sostre. Amico tried to have Williams released immediately and he was released on his own recognizance the next day (App. p. 6A), July 14, 1967. He was promptly conducted to police headquarters, where he was henceforth "employed" as an informant. There Officer Gristmacher gave Mr. Williams money and told him to meet him again at nine that evening. Mr. Williams promptly bought some heroin, using part of it and keeping another portion, and used other drugs later. He was still "high" when he kept his appointment with Officer Gristmacher (App. p. 6A) and for the entire evening. He was taken to police headquarters, hiding the remaining drugs under the seat of the car. Mr. Williams was searched by Officer Gristmacher in the presence of Louis Steverson, a plainclothesman from the state police. They later went to a point near Mr. Sostre's bookstore, and Williams and Steverson got out and walked to it. Once in the store, Arto Williams gave Martin Sostre a "high sign", which Sostre himself described as a jerk of Williams' thumb and a cut of his eyes toward the other man, and so Sostre asked the plainclothesman to leave. He did so, but stood outside the store looking through the open door. Williams then asked Martin Sostre to keep fifteen dollars for him, which, as Sostre testified, was not a surprising request from an addict at that bookstore. Sostre took the money, Williams surreptitiously put his hand up to

his shirt pocket (App. p. 7A) and left the store, ultimately giving the remaining part of the drugs he had bought earlier in the day to Alvin Gristmacher for evidence.

Following the arrest, and up to and after the trial of Martin Sostre, Arto Williams continued to work as a police informer. He worked on at least two cases and received money from Alvin Gristmacher. Mr. Williams testified that he received special consideration from the courts in two cases following the Sostre trial, which was confirmed by court records.

The testimony of Respondents' witnesses in this proceeding differed in some matters from that of Arto Williams with relation to the charge of selling heroin, but not in the basic outline of the transaction. The testimony of Peter Notaro, an Assistant District Attorney, was consistent with the testimony of Arto Williams in this proceeding, as well as Williams' letter of September 13, 1970, about his motives for going to California. Williams testified that he did not feel "safe" in Buffalo, and his parents were worried. He stressed, however, under rigorous cross-examination, that neither he nor his family had ever been threatened, nor had he ever "heard of any threats on the street." Mr. Notaro testified that he would recommend a perjury prosecution against Mr. Williams for his testimony in this proceeding.

State Trooper Thomas Constantine testified to finding glassine envelopes in a search following the alleged sale, which was beside the point in the present proceeding. State Trooper John Steinmetz testified that he had been assigned to surveillance of Sostre's bookstore some four or five days before the arrest. He observed the trans-

action through the open doorway of the store from the second floor across the street, but could not see the details.

State Trooper Louis Steverson testified in somewhat more detail. He disagreed with Arto Williams about the seating of the three persons in Alvin Gristmacher's automobile, placing himself in the back seat, and Williams in the right front (App. p. 7A). Officer Steverson "expected" to see a buy, and he testified that he did see one. But his own nearly contemporaneous affidavit contained no mention of the alleged "glassine envelope" (App. p. 8A fn. 8).

On March 15, 1974, Judge Curtin issued his opinion. He relied on the opinion of the Second Circuit in United States ex rel. Rice v. Vincent, 491 F. 2d 1326 (2d Cir. 1974) holding that he was not "reasonably well satisfied that the testimony given by Arto Williams at petitioner's trial was false." (App. p. 27A-28A)

The Second Circuit Court of Appeals affirmed that decision unanimously on March 31, 1975, with Chief Judge Feinberg writing a separate concurring opinion (App. p. 13A). Petitioner Martin Sostre seeks a writ of certiorari to review that decision.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS ISSUES OF IMPORTANCE FOR FEDERAL HABEAS CORPUS JURISDICTION

The standard pursuant to which a material recantation will require the order of a new trial by the federal courts has never been established by this Court, cf. Mooney v. Holohan, 294 U.S. 103 (1935); Napue v. Illinois, 360 U.S. 264 (1959). Mr. Sostre's is a celebrated case in its own right, one which has received notoriety because of the recantation of Arto Williams, as well as for its other features, see Tom Wicker in the New York Times, December 8, 1974, Sec. IV, p. 17 col. 5; citations in concurring opinion of Feinberg C.J. (App. p. 14A fn. 2) In its more general aspect, the question of the effect of a confession of perjury by the major prosecution witness upon the underlying conviction is one of central importance, both in the public mind and in the courts, for the administration of criminal justice. Other recent episodes of recantation have brought the matter to the fore in the press (see articles by Selwyn Raab concerning Rubin "Hurricane" Carter, New York Times, Sept. 27, 1974, p. 1 col. 2; id.,Sept. 28, 1974, p. 1 col. 2; Editorial, id., Dec. 14, 1974, p. 28 col. 2.) The issue has frequently come before the District and Circuit courts, although rarely in such a clear-cut and dramatic manner as this case. The federal courts should not continue longer without guidance on such a basic issue.

II.

THE RULING OF THE CIRCUIT COURT IS INCONSISTENT WITH RULINGS OF THIS COURT CONCERNING THE EFFECT OF PROSECUTION PROMISES UPON A WITNESS' CREDIBILITY

The Court below has applied standards which are inconsistent with the rulings of this Court. As the Circuit Court pointed out, App. p. 9A, Petitioner Sostre did argue strenuously that the informer Arto Williams "had a strong motive to testify falsely at the trial since he was facing a felony charge which, upon conviction, would subject him to a heavy sentence as a second felony offender." The possible second felony conviction was not the only element in Williams' motive, moreover.* It was undisputed that Mr. Williams obtained his release from pretrial detention upon that felony charge, with the assistance of the police and without bail, the very day that he went to Martin Sostre's bookshop. As to this category of motives, the Circuit Court said (App. p. 9A):

> ". . .[T]he very same fact could also account for Williams's willingness to testify truthfully at the trial to ingratiate himself with the police despite the fact that his purchase would result in the arrest of a fellow black who had at least on one occasion befriended Williams."

*The record showed that Williams received a final quid pro quo for his testimony, in the form of probation upon his plea of guilty to the felony charge, as well as other charges.

That ruling is in conflict with the law established in this Court. It is settled that consideration given by the prosecution is a motive to testify to a story which favors the prosecution, regardless whether the story be true or false. If the rule were otherwise, cases such as Giglio v. United States, 405 U.S. 150 (1972) could not arise. In that case, the prosecution failed to disclose a consideration given to the prosecution's main witness, and that failure was held to be a denial of due process of law to the defendant, with these words:

> Taliento's [the prosecution witness'] credibility as a witness was therefore an important issue in this case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility. . . 405 U.S. at 154-155

In Napue v. Illinois, 360 U.S. 264 (1959a), which arose out of similar facts in the state courts, this Court said:

> Had the jury been apprised of the true facts, however, it might well have concluded that Hamer [the prosecution witness] had fabricated testimony in order to curry the favor of the very representative of the state who was prosecuting the case in which Hamer was testifying. . . 360 U.S. at 270

See also DeMarco v. United States, 415 U.S. 449 (1974).

Under these rulings, it is not a permissible inference that consideration given by the prosecution is a motive to tell the truth as much as to lie. If that were so the truth about consideration given by the prosecution would not be so "material" that to withold it constitutes a denial of due process of law. In a situation where, as here, the prosecution's main witness recants, saying that he lied at the trial, the consideration offered to construct a story pleasing to the prosecution is plainly a motive to lie.

The erroneous ruling of the Court of Appeals is particularly important in this case. The original stories of all the other prosecution witnesses to the alleged purchase of heroin were consistent with Williams' recantation as well as with his original story at the trial. One state trooper was stationed in an office across the street, from which he could not see the details. Trooper Steverson claimed to have seen an object pass between petitioner Sostre and the witness Arto Williams, but his contemporaneous affidavit contained no mention of having seen such an object pass (App. pp. 8A; 33A fn. 2). There was no dispute that Arto Williams was in the petitioner's store, conversing with him, and the other eyewitnesses could corroborate little more than that. The prosecution's case thus depended entirely on Arto Williams. There were, finally, some insubstantial reasons lodged in Mr. Williams' own mind at the time of the trial in 1968 for him to feel apprehensive about petitioner Sostre. Thus the strong motives Mr. Williams had to tell a story that would convict Mr. Sostre, a man much "wanted" for other reasons by the authorities in Buffalo, assume paramount importance.

III.

THE RULES APPLIED BY THE COURT BELOW TO RECANTATION TESTIMONY ARE IMPROPER AND UNCONSTITUTIONAL

The present case calls for a clarification of the standards applicable in a federal habeas corpus proceeding, under 28 USC §2254, based upon the recantation of the testimony of a material witness. The Circuit Court and the District Court (App. pp. 8A; 27A) gave lip-service to the rule which prevails in the Second Circuit, taken originally from Larrison v. United States, 24 F. 2d 82, 87-88 (7th Cir 1928):

> "a) The court is reasonably well satisfied that the testimony given by a material witness is false.
>
> b) That without it the jury might have reached a different conclusion.*

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*There is authority that this standard ought to read "would probably have been different." This higher threshold is held, in the Second Circuit, to apply to cases in which the prosecuting attorney had not actually participated in the suppression of evidence, United States v. Polisi, 416 F. 2d 573, 577 (2nd Cir. 1969). The present case belongs in the latter category, because Arto Williams, although he was "employed" by the police as an informer, never attributed to them direct

> c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial."

There was no dispute that the last two standards were met. If Arto Williams had given at petitioner Sostre's trial the testimony he gave at this habeas corpus hearing, the jury's verdict would have been different, and the petitioner was unable to meet and cope with the false testimony at the time of the trial. It is the first standard which is at issue in this petition for certiorari.

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knowledge of his frame-up. The use at trial of the perjured testimony still constituted a denial of due process of law, both because Williams was an agent of the state, see Beatty v. United States, 389 U.S. 45 (1967) (per curiam) reversing 377 F. 2d. 181 (5th Cir. 1967), and because his evidence was of central importance. Jones v. Commonwealth, 97 F. 2d 335 (6th Cir. 1938); United States ex rel. Montgomery v. Ragen, 86 F. Supp. 382, 389 (N.D. Ill. 1949); Imbler v. Craven, 293 F. Supp. 795, 805-805 (C.D. Cal. 1969),aff'd 424 F. 2d 631 (9th Cir. 1970) cert. den 400 U.S. 865. This is especially true, where, as here, for procedural reasons the state allows the perjury to "go uncorrected when it appears." Napue v. Illinois, supra, 360 U.S. at 269. The issue whether the words "might" or "would probably" should properly have been used in this case was never reached. It would have made no practical difference in either case, because Williams' testimony was of such central importance that either standard could have been satisfied.

That standard has created an anomalous situation for the federal courts. When the witness has repudiated his trial testimony in a consistent manner, and the second standard has been met (the evidence is important enough that the jury's verdict would or might have been different), then to deny a new trial is to say that the conviction ought to stand based on the testimony of an admitted perjurer. The rule ought to be that it is enough for a new trial if in fact the witness is a perjurer; otherwise the court is making a choice that the witness' testimony is true at one time, but not at another. This choice is not only logically impossible to make in most cases, but is tantamount to permitting a conviction upon perjured testimony to stand. That is such a perversion of the court's process as to deny due process of law. See Mesarosh v. United States,352 U.S. 1 (1956); Napue v. Illinois, 360 U.S. 264 (1959); 8A Moore, Federal Practice ¶33.06 pp. 33-39 to 33-41 (1975 Ed.)

There are cases where it is tolerably clear, on the face of the evidence, that the "recanting" witness was not a perjurer at the trial. The most common of these occur where the witness recants his recantation. In such a case, there is smaller logical difficulty in deciding about the veracity of the witness. In one of these cases where the recantation had been later repudiated, the Ninth Circuit pointed out that the law for the unrepudiated recantation ought to be quite otherwise:

"The third affidavit was expressly recanted in her [the witness'] fourth and final affidavit of December 20, 1965. An unrepudiated recantation of trial testimony is not merely impeaching, but is substantial and material evidence (especially when made by a complaining witness), because the new version will presumably be testified to at the new trial. See 8 Moore's Federal Practice 2d Ed., §33.05, 33-16. But where the recantation has itself been repudiated, as is the case here, the recantation becomes merely impeaching and could be used at a new trial only for the purpose of cross examining the witness, and not as substantive evidence. See Moore, supra, at 33-18; cf. United States v. Troche, 2 Cir., 213 F. 2d 401, 403."
Lindsey v. United States, 368 F. 2d 633, 636 (9th Cir. 1967)

Unfortunately, the major cases in the federal courts have been of the latter type, where the witness has recanted his recantation, e.g. United States ex. rel. Rice v. Vincent, 491 F. 2d 1326, 1330 (2nd Cir. 1974); Larrison v. United States, 24 F. 2d 82, 85 (7th Cir. 1928). In those cases, the "reasonably likely" standard has not done great harm, because the first recantation was very likely to be false, and the witness was not an admitted perjurer at the time the petition was filed or the motion made. The situation is different in the relatively rare situation where, as here, the witness has repudiated his testimony of his own accord, and then stuck to his new story up to and including an evidentiary hearing in federal district court. In such a case, the federal court's refusal

to grant a new trial becomes a clear-cut and impermissible choice that an admitted perjurer's original testimony was true.

Where the repudiation of the original testimony is consistent throughout, and the witness' testimony is so important that the jury might have reached a different verdict, a new trial must be granted.

The concurring opinion of Chief Judge Feinberg points up the issue. After calling this case "troubling," (App. p. 15A), he said:

> In a case stirring such strong feelings, a claim that the conviction was based on perjurious testimony goes to the very heart of the criminal process, which, to be effective, must ultimately rest upon the confidence of the citizenry that it is fair and thorough.

That confidence is not encouraged when the judge at the hearing makes what is in effect a final determination that an admitted perjurer is lying the second time he has testified. In the interests of the fair administration of justice, as well as the appearance of its fairness, this Court should reject the "reasonably likely" standard. If the recantation is not obviously falsified, and especially when an appeals court judge finds it troubling, a new trial should be ordered where the evidence is clearly material and was not available at the time of trial.

Under this standard, a new trial should have been ordered in this case. There were some scraps of evidence that Arto Williams was fearful of revenge by Martin Sostre, but not a shred that Sostre or anyone associated with him ever said a harsh word to Mr. Williams.

Indeed, Sostre has remained in custody in New York from the day of his arrest in 1967, unable to raise bail, and Arto Williams rather quickly went to California. It was there, and not in New York, that Williams first recanted in 1971, adhering to his story up through the hearing in 1973. It is hard to imagine a stronger case for recantat on than this. Indeed, the rulings of the courts below create the equivalent of a standard much more stringent than the "reasonably likely" standard to which they purport to adhere. They effectively hold that a recantation cannot pass muster unless the petitioner can prove it true beyond a doubt. That is a standard which denies due process to the petitioner seeking relief from perjured testimony.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 283—September Term, 1974.

(Argued December 9, 1974 Decided March 31, 1975.)

Docket No. 74-1520

UNITED STATES OF AMERICA ex rel.
MARTIN SOSTRE,

Petitioner-Appellant,

—against—

FRANK M. FESTA, Superintendent of Erie County Jail; and ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility,

Respondents-Appellees.

Before:

FEINBERG and MULLIGAN, *Circuit Judges,* and
BRYAN,* *District Judge.*

Appeal from a denial of a writ of habeas corpus by John T. Curtin, *C.J.*, of the United States District Court for the Western District of New York.

Affirmed.

PAUL G. CHEVIGNY, New York, New York (New York Civil Liberties Union, New York,

* United States District Judge for the Southern District of New York, sitting by designation.

N.Y.; Herman Schwartz, Edward Koren, SUNY at Buffalo, Amherst, N.Y., on the Brief), *for Petitioner-Appellant.*

ARLENE R. SILVERMAN, Asst. Attorney General, New York, New York (Louis J. Lefkowitz, Attorney General, State of New York, Samuel A. Hirshowitz, First Asst. Attorney General, of Counsel), *for Respondents-Appellees.*

MULLIGAN, *Circuit Judge:*

Petitioner appeals from the denial of a writ of habeas corpus by the Hon. John T. Curtin, whose opinion, which fully sets out the facts, is reported in 373 F. Supp. 133 (W.D.N.Y. 1974). We affirm.

I.

a) The Trial

Petitioner Sostre was convicted in a New York State court on March 18, 1968 of possession of a dangerous drug (heroin) and the sale of a dangerous drug, as well as second-degree assault. We are here concerned only with the sale count. Petitioner's conviction was predicated largely on the testimony of the state's principal witness, one Arto Williams, a heroin addict awaiting trial on a larceny charge at the time of the alleged sale. Williams, as an informer for the Buffalo, New York police, testified that he had purchased heroin from the petitioner on July 14, 1967. Williams now recants his earlier testimony, and it is this recantation which provides the foundation for petitioner's habeas application.[1]

1 After Williams's recantation, petitioner initially applied for a writ of error coram nobis in the same New York State court where he had been convicted. However, at that time Williams was in California and refused voluntarily to come to New York. The New York court was powerless to compel his attendance; as a result, the application for the coram nobis writ was denied on March 30, 1972, the State court noting that Williams's presence could not be compelled. No appeal from that denial was taken. Instead, and also on March 30, 1972, petitioner filed this application for a writ of habeas corpus.

Faced with the requirements of 28 U.S.C. § 2254(b), Judge Curtin assumed that the state remedy was ineffective since there was no method of compelling Williams's appearance in the New York proceeding. Moreover, the State stipulated that the federal habeas procedure was appropriate. We do not consider that the statutory requirement of exhaustion of state remedies can be waived by the State. Moreover, it is disquieting that the presumably contrite and recanting witness Williams was not willing to appear voluntarily in the State court proceeding. However, in view of the unique circumstances related herein and the assumption of jurisdiction below, it would be wasteful of judicial energy to dismiss now for exhaustion of State remedies. This is especially true since on this appeal counsel for petitioner indicated his lack of knowledge of Williams's present whereabouts.

In his March 1968 state court trial, the petitioner Sostre refused the services of counsel and refused to participate in the proceedings. Williams testified that, on the evening of July 14, 1967, he met with Detective Alvin Gristmacher of the Buffalo Police Department Narcotics Squad and State Trooper Lewis Steverson. After Williams was searched by Gristmacher, the three men drove to petitioner Sostre's "third world" bookstore in a black ghetto area of Buffalo. Thereupon Williams was given $14.00 by Gristmacher, and Williams and Steverson (a black who was in plain clothes) entered Sostre's store, where they encountered Sostre and one Geraldine Robinson.

Williams testified that he then asked Sostre whether the latter was "doing any business;"[2] Sostre responded that he did not want to transact any business in front of a stranger, i.e., Steverson, so the latter left the store but remained standing in front, slightly to the left of the open doorway

2 The trial testimony of Steverson on this point is that Williams asked Sostre if he could "cop a bag"—the generally understood term for the purchase of a bag of drugs.

where he could still observe the proceedings, and where Williams could still see him. From this vantage point Steverson saw Williams give money to Geraldine Robinson. Then, according to the trial testimony of both Williams and Steverson, Sostre went to the back of his store, returned to the front and handed Williams a white glassine envelope.

Williams thereupon left the store and, accompanied by Steverson, returned to the car, where Williams turned over the glassine envelope to Gristmacher. Upon later analysis, the envelope was found to contain heroin.

In addition, the activities of Williams, Steverson, and Sostre while in the bookstore were observed from a building across the street by two other troopers. One of the two, Trooper Wilcox, who was using a telephoto lens to make his observations, testified that he saw Williams hand what appeared to be money to Geraldine Robinson, and that thereafter Sostre disappeared into the back of the store and returned to the front where he handed "something" to Williams.

The incidents just described occurred about midnight, and ten or fifteen minutes later, police officers executed a previously-obtained search warrant for Sostre's store. They arrested Sostre and recovered a marked $10 bill in his possession. They also searched the premises and found ten glassine envelopes containing heroin in the rear of the store.

As we have noted, at his trial Sostre refused to participate in any of the proceedings, since he claimed that the entire prosecution was a "frame-up" and that he had been singled out as a political radical, who, it was thought, had helped to instigate the June 1967 riot in Buffalo. Specifically, Sostre refused to cross-examine any of the witnesses who testified against him at the trial.

Following his conviction, Sostre was sentenced to a term of not less than 25 nor more than 30 years on the sale count, and lesser sentences on the other counts.[3]

After the trial, witness Williams left for California. There he became involved with an addict rehabilitation group called "Tuum Est." Allegedly because of the influence of that group, Williams decided to recant his trial testimony and, in April 1971, executed an affidavit in which he swore that Sostre had never sold him any drugs, and that Williams had lied at the trial in order to escape his own conviction as a second felony offender.[4] Subsequent to his Tuum Est experiences, however, Williams was again arrested, both in September and December of 1972, in California, for possession of heroin; as a result, in January 1973, he pleaded guilty to a drug misdemeanor count. At the time of the hearing below he was in the custody of the California authorities.

William's recantation fathered the instant action, which in turn led to the hearing before Judge Curtin below on May 29-30, 1973.

b) The Hearing

The principal witness at this hearing was Arto Williams. He testified that, after his June 1967 arrest and pre-trial incarceration on a larceny charge, he took the initiative in contacting the Buffalo Police Narcotics Division by letter, offering his services. Subsequently Detective Gristmacher visited Williams in jail and asked the latter if he

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3 Although the trial court ordered the sentences to run consecutively, this was changed by the Appellate Division to concurrent sentences; the conviction was otherwise affirmed without opinion, 348 N.Y.S.2d 760 (4th Dep't 1973). In January 1974, Sostre's application for leave to appeal to the New York Court of Appeals was denied.

4 In fact, Williams was only put on probation after conviction on the larceny charge.

knew anyone who was selling drugs in the Buffalo area. Williams replied in the affirmative and recited a few names, none of which seemed, to Williams, to interest Gristmacher. Then Gristmacher asked Williams if Sostre was a drug dealer, and Williams replied in the affirmative. According to Williams, Gristmacher said that the police were "very interested" in Sostre because they believed him to be "the cause" of the 1967 riot. About a week later, when Gristmacher, this time accompanied by Chief Amico of the Narcotics Division, again visited Williams in his cell, the latter repeated that he knew Sostre was dealing in drugs.

Williams agreed to cooperate with the police. On July 14, 1967, Williams was released from prison on his own recognizance. He thereupon was brought to police headquarters where he met Gristmacher, who gave him some money and arranged to meet with him later that day. Williams then testified that he used the money to buy a quantity of heroin, part of which he used immediately, and part of which he retained in his possession. In addition, Williams "shot up" some other drugs given to him by friends.

By the time he met Gristmacher at about 9 p.m. the same day, Williams was, by his own testimony, still very high. Gristmacher drove Williams to police headquarters; the former left the car and went inside the building for approximately 15 minutes, leaving Williams by himself in the car. At this time, Williams testified he secreted the small packet of unused drugs (measuring approximately 1⅞ x ⅞ inches) from his afternoon purchase under the front seat of the car, having already formulated the intent to use this portion of drugs to frame Sostre.

When Gristmacher returned to the car, he was accompanied by Trooper Steverson. Before driving off, Gristmacher frisked Williams but found nothing since (according to Williams) the drugs he had bought earlier were already hidden under the car seat.

The trio then drove around for awhile, ultimately arriving at a judge's home where a search warrant was obtained. During this trip, Williams testified that he was in the back seat of the car, with the two officers in front. On the way to Sostre's bookstore, Williams testified he was able to retrieve the packet of drugs hidden under the front seat without being detected by either of the two officers, and put it back in his pocket.[5]

Upon reaching the vicinity of Sostre's bookstore, Gristmacher gave $15 in marked bills to Williams, who left the car and entered the store with Steverson. After exchanging greetings with Sostre, Williams testified that he gave Sostre a "high sign" which indicated that he, Williams, wanted to see Sostre outside Steverson's presence. Accordingly, Sostre asked Steverson to leave, and he did so, remaining outside the store's front door.

Williams then testified that he gave $15 to Sostre for safekeeping.[6] After the money had changed hands, Williams passed his hand over his shirt pocket, as if he were placing something therein. Sostre disappeared momentarily into the rear of the store; when he emerged, he and Williams engaged in some small talk, and then Williams left the store.[7] Williams and Steverson returned on foot

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5 The testimony of Steverson at the hearing is different; he testified that Williams was in the front seat at all times, next to Gristmacher and directly in front of Steverson who was in the rear seat. Steverson said that at no time did Williams bend over to reach under the front seat of the car, and that if Williams had done so, he (Steverson) would have noticed.

6 On a previous occasion, apparently, Sostre had kept a suit of Williams's for a short time.

7 Williams's testimony on cross-examination at the hearing is slightly different: after the money changed hands, Sostre went into the back of the store. When he returned, Williams reached across the counter and then dropped his hand into his shirt pocket.

to the car, where Williams handed over the drugs to Gristmacher, telling the police officer that he had bought them from Sostre, whereas in fact (according to Williams's recantation) he had obtained them earlier that day from someone other than Sostre.

A number of other witnesses testified at the hearing below, including petitioner Sostre himself, who admitted to six or seven prior convictions including a 12-year sentence ending in 1964 for the possession of heroin. Most significant was the testimony of State Trooper Steverson, who reiterated his trial testimony in full, in particular repeating that he saw Sostre hand a glassine envelope to Williams in Sostre's store.[8]

II.

There is no dispute on this appeal that in a habeas corpus proceeding the three-pronged test to determine if a witness's recantation necessitates a new trial is whether

"a) The court is reasonably well satisfied that the testimony given by a material witness is false.

b) That without it the jury *might* have reached a different conclusion.

8 Petitioner's counsel attempts to impeach Steverson's testimony in two ways: 1) by pointing out that Steverson's affidavit of July 17, 1967 made no mention of seeing a glassine envelope pass from Sostre to Williams, but rather only stated that the two men extended their hands to one another. While this is a significant omission, we believe it is outweighed by Steverson's sworn testimony, both at the trial and at the hearing below, that he did in fact see the drugs pass from Sostre to Williams; 2) by attempting to demonstrate that, from his vantage point, Steverson could not have seen the transaction. However, we believe the petitioner's evidence on this point is inconclusive at best, and certainly is not sufficient to impeach Steverson's testimony. While Steverson was not cross-examined at the trial due to Sostre's refusal to accept legal assistance or to participate in the proceedings himself, he was cross-examined at the hearing and Judge Curtin found that his testimony was "not shaken."

c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial."

United States ex rel. Rice v. *Vincent*, 491 F.2d 1326, 1331-32 (2d Cir. 1974), quoting from *Larrison* v. *United States*, 24 F.2d 82, 87-88 (7th Cir. 1928). Judge Curtin here found that the first requirement was not complied with, i.e., he was not reasonably well satisfied that Williams's trial testimony was false. As the petitioner concedes, in order to succeed here on this habeas appeal he must establish that the conclusion of the court below with respect to the credibility of Williams's recantation was "clearly erroneous." See *United States ex rel. Rosa* v. *Follette*, 395 F.2d 721, 726 (2d Cir.), cert. denied, 393 U.S. 892 (1968). Judge Curtin indicated at the outset of the hearing below that the credibility of Williams is "really the whole issue here." Having in mind that Judge Curtin had the opportunity of personally observing the demeanor and the behavior of Williams on the stand under oath, which is a factor of major moment, see *United States ex rel. Diblin* v. *Follette*, 418 F.2d 408, 411 (2d Cir. 1969), we cannot by any means characterize his finding as "clearly erroneous."

Petitioner argues that Williams had a strong motive to testify falsely at the trial since he was facing a felony charge which, upon conviction, would subject him to a heavy sentence as a second felony offender. However, the very same fact could also account for Williams's willingness to testify *truthfully* at the trial to ingratiate himself with the police despite the fact that his purchase would result in the arrest of a fellow black who had at least on one occasion befriended Williams. In short, the motivation point does not advance the petitioner's argument here a

jot or a tittle since it equally supports the proposition that Williams told the truth at the trial.

Petitioner further argues that Williams's willingness to testify at the hearing that his trial testimony was false would expose him to the real threat of a perjury charge.[9] However, the same can be said for every "recanter." And though there is always exposure to the threat of a perjury charge, traditionally the recantation of testimony given on trial is "looked upon with the utmost suspicion," *United States* v. *Troche*, 213 F.2d 401, 403 (2d Cir. 1954), quoting from *Harrison* v. *United States*, 7 F.2d 259, 262 (2d Cir. 1925); see 2 C. Wright, Federal Practice and Procedure § 557, at 526-28 (1969).[10]

Moreover, here there is other evidence which would indicate that Williams had a real fear for his own safety which might well outweigh his fear of a perjury conviction. On cross-examination at the hearing below Williams admitted that he left Buffalo for California after the trial because "I thought it wasn't safe for me being here [in Buffalo]." Williams's testimony on this point was clearly evasive and although he shied away from the admission of specific threats, he admitted that he was "worried." At the hearing there was also testimony from Peter Notaro,

9 In fact, Peter Notaro, the New York district attorney who tried Sostre's case in the State trial court, testified at the hearing that he intended to recommend that Williams be prosecuted for perjury.

10 Numerous cases from this circuit have refused to grant a new trial when the recantation of a witness was found by the trial court not to be credible. E.g., *United States* v. *Curry*, 358 F.2d 904, 918 (2d Cir. 1965), cert. denied, 385 U.S. 873 (1966) ("When as here the district judge resolves all doubt against the defendant and determines that the trial testimony is not impeached by the recantation, there is no need to try the case anew before a jury." (citation omitted)); *United States* v. *Ratley*, 284 F.2d 553, 554 (2d Cir. 1960); *United States* v. *Persico*, 339 F. Supp. 1077 (E.D.N.Y.), aff'd on the opinion below, 457 F.2d 485 (2d Cir. 1972), cert. denied, 410 U.S. 946 (1973).

Chief of the Appeals Bureau of the Erie County District Attorney's office, who testified that after Sostre's conviction Williams had asked to be permitted to finish his probation or parole in California, since he feared that he would be injured "in some fashion" by Sostre's friends. He also stated that members of Williams's family had been threatened. The lower court also had before it Exhibit J, a letter from Williams to an official of the California State Department of Probation dated September 13, 1970, in which he stated that his brother was stabbed to death a month after Sostre's conviction, and that he (Williams) was used to set up a buy (from Sostre) which "came off as planned." He also stated, "I guess by now you know my life is in danger." Whether Williams's fear of retaliation was well-founded or whether there is any basis for his suspicion that his brother's life was taken because of his part in Sostre's conviction is not before us and is not relevant. The point is that, whether justified or not, Arto Williams was obviously a very frightened man at least as late as September, 1970.

As regards the contention that his motivation for recanting was his "conversion" by Tuum Est, we should point out that there was absolutely no evidence or testimony in the hearing before the court below to support the bona fides of Williams's decision to disavow his trial testimony. His two arrests in later 1972 for possession of heroin and his January 1973 guilty plea to a misdemeanor would suggest that he was no Paul of Tarsis.

Even aside from the skepticism of Judge Curtin, who had the opportunity at first hand to observe the demeanor and behavior of Williams on the stand and thus to gauge his veracity, the "recantation" itself as it appears on the record to this appellate court is inherently incredible and at best Procrustean. During the entire transaction Wil-

liams was either in the company or under the observation of the police. The story he now tells neatly and substantially fits in with his prior trial testimony except for the crucial question as to whether or not the drug envelope he surrendered to the police was provided by Sostre or by his own sleight of hand. There is no contention here or below that the police participated in or were even aware of the fact that Williams intended to frame Sostre by palming off his own drugs. In fact, they were careful to frisk him before driving off in the police car to insure that he was free of drugs. Williams would now have us believe that although he was admittedly high on drugs, he had the prescience to secrete the drug envelope under the front seat of a police car in order to thwart its detection on his person. Yet upon questioning by the court Williams admitted that he did not know the details of the plan or when the arrest of Sostre was to take place (though he did know that Sostre was the target of the bust). It strains credulity to believe that Williams could anticipate the timing and place of the frisk or that he could retrieve the drugs in time to frame Sostre.

Moreover, as we have already noted, William's story that he was alone in the back seat of the car and was able to pick up the drugs without being detected, was contradicted by Steverson who placed him in the front seat next to Gristmacher. It is beyond belief that Williams could retrieve the small packet under the front seat of the car without drawing the attention of two experienced police officers who were with him in such close proximity. The further claim that Williams passed the money to Sostre for safekeeping and not for the purchase of drugs is inconsistent with the fact that, within 10 or 15 minutes of the transaction in question, some 10 glassine bags of heroin were found by the police in the back of Sostre's store, the

very place where, according to some testimony (see note 7 supra and accompanying text), Sostre had gone immediately before handing over the drugs to Williams.

In view of the foregoing testimony and evidence produced at the hearing, and emphasizing the opportunity of the experienced jurist personally to estimate the credibility of the witnesses who appeared before him, we cannot characterize as "clearly erroneous" the finding of Judge Curtin that he was not reasonably well satisfied that the testimony of Arto Williams at the petitioner's trial was false.

Accordingly, we affirm.

FEINBERG, *Circuit Judge* (concurring):

Although I concur in the result reached by the majority in this troubling case, I think it appropriate to record some further observations.

I am concerned first of all with the attitude the state has displayed in this proceeding toward the requirement that an applicant for federal habeas corpus exhaust his remedies in the state courts. That statutory requirement is not merely a formal admonition. It goes to the heart of the federal-state distribution of power and affords a state court system the chance to keep its own house in order before a federal court steps in to rule on a federal constitutional claim. In this court, after a request from the panel for further briefing on the exhaustion question,[1] the state now suggests that

1 In post-argument letters, the parties dispute the applicability of N.Y. Crim. Prac. Law § 650.20 (McKinney 1971) (securing attendance as witness of prisoner confined in another jurisdiction), N.Y. Crim. Proc. Law § 680.10 (examination of witness on commission), and N.Y. Crim. Proc. Law § 640.10(3) (Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings). The key question, apparently decided against Sostre by the state coram nobis court and not appealed, is whether these procedures are available in a post-conviction proceeding.

means were available to secure Arto Williams's testimony for the coram nobis proceeding in the state court. Yet, before Judge Curtin, the state in effect stipulated that state remedies had been exhausted, as Judge Mulligan's thorough opinion points out in footnote 1. More significantly, in the coram nobis proceeding, the District Attorney apparently argued that various suggested methods to obtain the testimony of Williams were unavailable. The effect of the state's change in position, if accepted, would thus be first to deny a state remedy and then to frustrate federal relief.

This manipulation of the exhaustion doctrine is particularly disturbing because this is precisely the kind of case that has provoked frequent admonitions from state prosecutors to the federal courts not to be quick to "interfere" with the state criminal process. Justifiably or not, Sostre has become to some a symbol of the inequities of our criminal justice system.[2] The record shows that in 1967 the Buffalo police were out to "get" Sostre because they thought he was the principal instigator of the then recent riot in the black ghetto of the city. Moreover, his original sentence was a savage one: 25 to 30 years on the conviction now under attack for the sale of one packet of heroin, five to ten years for his fracas with the arresting officers, one year for possession of the heroin packets, and 30 days for contempt of court, all to be served *consecutively*. This was

2 See, e.g., V. Copeland, The Crime of Martin Sostre (1970); Schwartz, A Comment on *Sostre* v. *McGinnis*, 21 Buff. L. Rev. 775, 775-76 (1972). In addition to the landmark case of *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971) (en banc), cert. denied, 405 U.S. 978 (1972), Sostre has been a plaintiff in a number of other actions seeking to establish the rights of prisoners: *Sostre* v. *Otis*, 330 F. Supp. 941 (S.D.N.Y. 1971) (Mansfield, *J.*); *Sostre* v. *McGinnis*, 334 F.2d 206 (2d Cir.), cert. denied, 379 U.S. 892 (1964); *Pierce* v. *LaVallee*, 293 F.2d 233 (2d Cir. 1961), on remand, 212 F. Supp. 865 (N.D.N.Y. 1962), aff'd, 319 F.2d 844 (2d Cir.), cert. denied, 374 U.S. 850 (1963).

virtually a life sentence for a man then in his mid-forties.[3] Furthermore, Sostre has remained a marked man in prison. From prior proceedings before us, we know that he was kept in solitary confinement under outrageous conditions for over a year and was then harshly punished again for having "dust" on his cell bars.[4]

In a case stirring such strong feelings, a claim that the conviction was based on perjurious testimony goes to the very heart of the criminal process, which, to be effective, must ultimately rest upon the confidence of the citizenry that it is fair and thorough. How appropriate, then, that a searching inquiry into a possibly tainted conviction should have been made, in the first instance, through the state judicial process, since its integrity was being challenged. Arto Williams was located in May 1973 in custody in California. One wonders why it was impossible then for New York State officials to arrange with California officials to have Williams transported to New York for a reopened hearing on the coram nobis petition.

Nevertheless, I agree with the majority that it would be an unfortunate exercise in futility to dismiss now for failure to exhaust. There was substantial doubt about the technical availability of compulsory state process to secure Williams's testimony and, as the majority points out, counsel for Sostre now indicates "his lack of knowledge of Williams's present whereabouts." Under the circumstances, sound judicial administration suggests upholding Judge Curtain's assumption of jurisdiction.

I am concerned also in this case because the record is unfortunately incomplete in a number of respects which bear on whether Williams told the truth in 1973 when he

3 The Supreme Court, Appellate Division, Fourth Department, modified the sentences so that they run concurrently. 348 N.Y.S.2d 760 (1973).

4 *Sostre* v. *McGinnis* supra, 442 F.2d at 187 n.8.

exonerated Sostre or in 1968 when he implicated him. For example, one of the key documents before Judge Curtin was an affidavit of Williams, dated April 8, 1971, in which he swears that he framed Sostre. That document states that before Williams decided to tell "the truth" he had long discussions with Hollis Candy Latson, the coordinator of Tuum Est, and that Latson wrote to Judge Motley of the United States District Court for the Southern District of New York on March 26, 1971, telling her of Williams's decision to recant. Was there such a letter from Latson? Who was Latson? Was he a person who might be particularly believable because of his background? What did Williams say to him prior to his recantation? Was Latson available as a witness? Another witness uncalled at the habeas hearing before Judge Curtin was Detective Gristmacher, who was clearly the prime mover in enlisting Williams as an informer, and who continued to look out for Williams and even used him to make another buy. Apparently, the state did not call Gristmacher because, according to Sostre's own affidavit in support of the petition, Gristmacher "was fired from the police force on March 15, 1972 for appropriating 5 ounces of heroin from the evidence locker of Police Headquarters, and refusing to cooperate with the Federal authorities in regards to the stolen heroin." If this allegation is accurate, Sostre's claim that this occurrence impeaches Gristmacher's credibility would appear to be an understatement.

The case thus presents serious procedural and factual questions. But while these matters are not free from doubt, the issue before the federal district court was whether Sostre had been denied due process because of the alleged perjury of Williams. The burden of proof in this post-conviction proceeding was on Sostre. Appellant has had his day in court on his constitutional claim before an ex-

perienced and fair federal trial judge. The crucial fact is that Judge Curtin heard Williams testify and simply did not believe his story. After long and careful review of the record, I cannot say that Judge Curtin's decision was clearly erroneous. Accordingly, I concur in the affirmance of the order of the district court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA ex rel. MARTIN SOSTRE,

Petitioner

-vs- Civil 1972-237

FRANK M. FESTA, Superintendent of Erie County Jail, and ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility,

Respondents

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This is an application for a writ of habeas corpus by state prisoner Martin Sostre, who was convicted on March 18, 1968 of possession of a dangerous drug, sale of a dangerous drug and second degree assault in Erie County Court before County Court Judge Frederick M. Marshall. He was sentenced for the sale of the drug to an indeterminate term of not less than twenty-five (25) years or more than thirty (30) years, for assault in the second degree to a term of not less than five (5) or more than ten (10) years, for possession of the drug to a term of one (1) year, and for contempt of court committed on March 18, 1968 to a term of thirty (30) days. The court ordered the sentences to run consecutively.

The application to this court, which seeks only to set aside the conviction for the sale of the dangerous drug, is based on the recantation of the testimony of the principal prosecution witness at Sostre's trial. That witness was Arto Williams, a heroin addict, awaiting trial in the Erie County Jail on a larceny charge. During Sostre's trial, Williams, who became an informant for the Buffalo Police Department Narcotics Squad, testified that he purchased heroin from the petitioner on July 14, 1967. In April of 1971, Williams executed an affidavit recanting that testimony. In his affidavit Williams swears that he lied at Sostre's trial, that Sostre never sold him any drugs, and that Williams framed Sostre to avoid his own conviction as a second felony offender. The affidavit further states that Williams was recanting his testimony after realizing "the importance of telling the truth and . . . after discussion with . . . [a] coordinator of Tuum Est." Based upon the Williams affidavit, petitioner applied for a writ of error coram nobis in the Erie County Court. Because Williams resided in California and refused to voluntarily come to New York State, and because the state court was without the power to obtain his attendance by subpoena or order, Sostre was unable to secure the attendance of Williams at a hearing on his coram nobis application. Thus, based on Sostre's inability to produce Williams, the application for a writ of error coram nobis was denied on March 30, 1972. On that same day, petitioner filed this application for a writ of habeas corpus. Petitioner has not appealed the dismissal of the state coram nobis application, but counsel have stipulated that the absence of any provision

under state law to secure the attendance of Williams as a witness in the state court proceeding would make any such appeal futile. Although at the time this action was commenced petitioner's direct appeal from his conviction was still pending in the New York State courts, counsel for both parties have agreed that the issues here are presented outside the trial record and are thus not reviewable on direct appeal of petitioner's conviction.[1]

The court finds that petitioner is entitled to proceed under Title 28, United States Code, Section 2254(b), which provides in part that

> [a]n application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears . . . that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

The proceedings in this court were delayed for some time because petitioner's counsel had difficulty locating Arto Williams, who was in California. In May of 1973, Williams was located in custody in California and an application was made by petitioner for a writ of habeas corpus ad testificandum. The writ was granted and, through the cooperation of the United States Attorney and the United States Marshal, Williams was transported from California to Buffalo, New York. After also ordering Sostre's appearance, a hearing was held in this court on May 29 and May 30, 1973. At the hearing the court heard testimony from Arto Williams, Martin

Sostre and various police officers who participated in the investigation and arrest. The court received a transcript of petitioner's Erie County Court trial and various exhibits. These exhibits consisted of photographs of the Martin Sostre bookstore where the alleged sale occurred, and a copy of the affidavit of State Trooper Lewis Steverson upon which the application for a search warrant was based. By stipulation of counsel, the court considered exhibits A through J, which are annexed to a notice of motion dated July 18, 1973. These exhibits set forth the details of Arto Williams' criminal record after he left the Buffalo area for California. The court sustained petitioner's objection to, and has not considered, exhibit K, a letter written by a Buffalo attorney.

THE TRIAL

The transcript of the Erie County Court trial of March 1968 reveals that Sostre, appearing as his own attorney, rejected the offer of the County Court Judge for assigned counsel. The court requested counsel and an investigator to be available to Sostre during the course of the trial. At the direction of the court, they attempted to track down certain leads suggested by the defendant. Judge Marshall ordered the reporter to prepare daily copy for the use of petitioner. Sostre, acting as his own counsel, refused to question the jurors during the voir dire or exercise any of his preliminary challenges; he also refused to make an opening statement, cross-examine any of the witnesses against him, or sum up to the jury. At each stage of the proceedings, Judge Marshall advised him of his rights.

At the trial, Williams testified that before the events of July 14, 1967 he had known Sostre for about a year. He related that on the evening of July 14 he met with Detective Alvin Gristmacher of the Buffalo Police Department Narcotics Squad and State Trooper Lewis T. Steverson. After being searched by Detective Gristmacher, Williams accompanied the two police officers in a police vehicle to the neighborhood of a bookstore operated by the defendant Martin Sostre, at 1412 Jefferson Avenue in the City of Buffalo. Upon arrival, he received $15.00 from Detective Gristmacher and he and Trooper Steverson, who was in plain clothes, proceeded to the bookstore on foot. When Williams and Steverson entered the store, Sostre and Geraldine Robinson were behind the counter, not too far from the entrance.

At the trial, no witness described the bookstore premises or set forth the exact positions of the parties during the transaction. Williams testified that after he and Steverson entered the store, he asked Sostre whether Sostre was "doing any business." Sostre responded that he did not want to do any business with strangers in the store. Trooper Steverson's testimony at the trial on this point was somewhat different. He recalled that Williams asked Sostre if he could "cop a bag." Sostre looked at Steverson and said he did not know him and that he would not do business in front of a stranger. Williams stated that he and Steverson then walked out of the store, Williams reentered and Steverson remained standing in front, a little to the left of the doorway with the door open. Williams could see Steverson and, from his vantage point, Steverson could observe Williams, Sostre and Geraldine Robinson. Steverson saw Willaims give some

money to Geraldine Robinson, who counted it and then said something to Sostre who was standing next to her. At the trial both Steverson and Williams testified that Sostre then proceeded to the rear of the store, returned to the front and handed Williams a white glassine envelope. Upon receiving the envelope, Williams left the store and returned to Gristmacher's automobile with Steverson, where Williams handed the glassine envelope to Gristmacher. A later analysis revealed the contents of this envelope to be heroin.

While Williams and Steverson were at the bookstore with Sostre, Troopers John Wilcox and John Steinmetz testified that they were able to observe the activities in the bookstore from a surveillance position across the street. The troopers testified that they saw Williams and Steverson enter the bookstore, Steverson leave with Williams, Williams reenter, Steverson stand in front of the store and Williams again come out of the store and leave with Steverson. Further, Trooper Wilcox testified that he saw Williams hand money to the woman in the store who was standing next to Sostre. Thereafter, Wilcox observed Sostre disappear into the rear of the store and then return to the front where he handed Williams "something." Trooper Wilcox made these observations with the assistance of a telephoto lens.

After Williams delivered the envelope to Gristmacher, the officers executed a search warrant which they had previously obtained for the premises. They arrested Sostre, found a marked $10 bill in his possession, searched the bookstore and found ten glassine envelopes containing heroin in a filing cabinet in the rear of the store.

THE HEARING

At the hearing, Arto Williams testified that after he was arrested in June 1967 on a felony charge, he contacted the Buffalo Police Department by letter, offering assistance. A short time thereafter, Detective Alvin Gristmacher of the Buffalo Police Narcotics Squad visited Williams in jail. Gristmacher asked Williams whether he knew anyone selling drugs in the Buffalo area. After Williams named a few individuals, Gristmacher asked him if he knew whether Sostre was selling drugs. Williams responded "yes." At that, Gristmacher said: "Well, we are very interested in Sostre because we believe that he was the cause of the riot at the time in '67." About a week later, Officer Gristmacher returned to the jail with Michael Amico, then Chief of the Narcotics Division in the Buffalo Police Department. Williams again stated that he knew that Sostre was selling drugs. On the next day, July 14, Williams claims he was released on his own recognizance and brought to Police Headquarters where he met Officer Gristmacher. Gristmacher gave Williams some money and arranged to meet him at about 9:00 p.m. that evening. According to Williams, he left, bought some heroin, used one-half of it and kept the rest. He also claimed that he obtained additional drugs from other individuals on the street and was still high when he met with Officer Gristmacher that evening. After meeting Gristmacher, they drove to Police Headquarters and Gristmacher went inside, leaving Williams alone in the car for about fifteen minutes. He then returned with Trooper Steverson. According to Williams, while Gristmacher was away from the car Williams secreted the partial

bag of drugs he had purchased in the afternoon under the front seat. After driving around for a while, Gristmacher stopped at a judge's home where he obtained a search warrant. Then Gristmacher drove Steverson and Williams to the vicinity of the Sostre bookstore. Williams testified that while they were driving around, and before he got out of the car, he retrieved the half bag of drugs which he had previously placed under the right front seat. Gristmacher then gave $15.00 to Williams and he and Steverson left the car and walked to the Sostre bookstore. Williams testified that when he entered the store with Steverson, Sostre was standing behind the counter alone. After a greeting, he indicated to Sostre that he wanted to see him outside of Steverson's presence. Williams explained that this desire to see Sostre alone was communicated to Sostre by means of a motion which he could not describe at the hearing, but which he claims Sostre understood. When Sostre asked Steverson to leave, Williams and Steverson walked outside together.

During the cross-examination of Trooper Steverson by counsel for petitioner, a more detailed description of the premises and the relative position of the participants during the alleged sale was elicited. Trooper Steverson testified that when he and Williams entered, Sostre and Geraldine Robinson were standing about fifteen feet from the door of the store behind a short counter. During the transaction with Williams, they were facing the street, Robinson to the right and Sostre to the left, to one viewing from the outside. Williams was in front of them on the other side of the counter, with his back to the street. During the time of the alleged sale, Steverson stood in front of the store, about three feet from the doorway.

After walking outside with Steverson,

Williams reentered the store and had a conversation with Sostre about $15.00. Several versions of this conversation were given at the hearing. Williams said that he gave $15.00 to Sostre to hold for him, without giving a reason for this request. Sostre recalled that Williams asked him to hold $15.00 so he would not "blow it." In his direct examination at the hearing, Williams stated that after he gave the $15.00 to Sostre, he brought his hand back across the counter and passed it over his shirt pocket. He said that after he gave Sostre the money, Sostre went to the rear of the store and Williams heard him talking to someone whom he assumed to be Geraldine Robinson. Then Sostre returned to the front of the store where he and Williams talked for a minute before Williams left. During cross-examination Williams said that after he gave Sostre the $15.00, Sostre went to the back room to give the money to Geraldine Robinson. When Sostre returned to the front of the store and approached the counter, Williams dropped his hand into his shirt pocket, but could not recall whether Sostre's hand touched his or not. On this point, Sostre's account of what occurred is different from Williams' version on either his direct or cross-examination. Sostre testified that after Williams requested him to hold the money so that he would not "blow it," Sostre accepted it, Williams and he made small talk and then Williams left. Sostre said that he put some of the money in the register and gave some of it to Geraldine Robinson, but he did not testify that he went to the rear of the store. He said that before Williams left he probably exchanged a slap-handshake with him but could not specifically recall. He was not cross-examined. After leaving the store, Williams and Steverson returned to the Gristmacher

automobile by walking and gave Gristmacher the drugs which Williams claimed he obtained from the floor of the car, not from Sostre.

The Second Circuit, in the recent case of United States ex rel. Rice v. Vincent, Nos. 73-2195, 73-2196 (2d Cir., Feb. 7, 1974), considered the standards to be applied by the court in determining whether a witness's recantation requires a new trial. Citing Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir. 1928), the court stated (emphasis original):

> [A] new trial should be granted when,
>
> (a) The court is reasonably well satisfied that the testimony given by a material witness is false.
>
> (b) That without it the jury *might* have reached a different conclusion.
>
> (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

United States ex rel. Rice v. Vincent, supra at 1666.

The court finds in this case that petitioner has failed to meet the first criteria of the standard adopted in Rice. Noting that recantations of testimony given at trial are to be "looked upon with the utmost suspicion," United States v. Troche, 213 F.2d 401, 403 (2d Cir. 1954), quoting Harrison V. United States, 7 F.2d 259, 262 (2d Cir. 1925), the court is not reasonably satisfied that the testimony given by Arto

Williams at petitioner's trial was false.

There are many reasons why Williams' testimony at the hearing is unworthy of belief. Although there is no evidence before the court that Williams was threatened, the record is clear that after he testified at the 1968 Sostre trial he feared injury in Buffalo and felt safer in California. After he was released on probation in Buffalo, Williams told Peter Notaro, who prosecuted the Sostre case as Assistant District Attorney, that he wanted his probation transferred to California because he was afraid of being injured by the "friends of Martin." In September 1970 he wrote a letter to his California probation officer in which he explained that he left Buffalo because he was fearful for his life after testifying in the Sostre case. He wrote: "I guess by now you know my life is in danger." In July 1969 while Williams was on probation, he left Buffalo without permission to go to California. During 1970 he joined Tuum Est, an organization which Williams explained is devoted to influence its members to be honest with themselves and to live within the eyes of the law. He testified that it was the influence of this organization that prompted him to execute the April 1971 affidavit recanting his trial testimony. Whether Williams is sincere about this explanation is questionable because he was arrested in September 1972 and again in December 1972, in California, on heroin felony charges. In early 1973 he pled to a misdemeanor drug count. His less than candid attitude with this court was exhibited during cross-examination about these events when he insisted that he had not been arrested for a felony charge in California after the execution of the affidavit, and tried to explain away the arrest by insisting that it was for the sale of baby aspirin. His California probation was

revoked in 1973 and, at the time of the hearing before this court, he was in the custody of California authorities.

Apart from the circumstances surrounding Williams' recantation, his story of the events of the evening of the Sostre arrest, on its face, is open to serious question. By his own account, when he met Sergeant Gristmacher on the evening of July 14, 1967, he was "high" from the drugs he had used during the afternoon and he had no idea of what he was expected to do. Williams' explanation that he was able to secrete the envelope, 1-7/8 inches long by 7/8 of an inch wide, under the front seat of the car, and retrieve it while sitting in the rear seat without Steverson or Gristmacher being aware of it, is difficult to believe. Steverson testified that Williams was in the front seat at all times, while he was in the rear behind Williams, and that Williams never reached down for any article under the front seat.

On each occasion when Williams testified about his transaction with Sostre, he has given a different account. At the trial, Williams said he gave $15.00 to Geraldine Robinson who counted it and passed it to Sostre. This version was confirmed at the trial and at the hearing by Trooper Steverson and the other witnesses. At the hearing, Williams testified that only Sostre was in the front of the store and he handed the $15.00 directly to him. At trial, Williams stated that after Sostre received the $15.00, Sostre went to the rear of the store, then returned to the front and handed Williams a white glassine envelope. Steverson and the others gave the same account of Sostre's movements and Steverson observed that a glassine envelope passed from Sostre to Williams. At the hearing, Williams testified that after he gave the money to Sostre, Sostre went to the rear of the store, then returned after a short interval

and conversed briefly with Williams. Not even Sostre supports this testimony, for he said nothing at all about going to the rear of the store after receiving the money from Williams. Furthermore, if Williams' purpose was only to have Sostre hold the money for him, he gave no explanation of why he remained at the counter after he gave the money to Sostre.

During the hearing, Williams attempted to recant his trial testimony that Sostre passed him a glassine envelope. He gave one version of this recantation on direct and another during his cross-examination. During direct examination, Williams said that after he gave the money to Sostre, he brought his hand back across the counter and then to his shirt pocket. Upon cross-examination, he said that he waited until Sostre returned from the rear of the store before putting his hand to his pocket, and he could not recall whether he and Sostre touched hands or not. Sostre testified to a third version of the incident. He stated that he thought he exchanged a slap-handshake with Williams.

While there is much in the record to question the credibility of Arto Williams, there is no reason not to believe the testimony of the police officers who were involved. Steverson's testimony that he stood in the open doorway to Sostre's bookstore, that he had a clear and unobstructed view of the Sostre-Williams transaction, and that he saw a small glassine envelope pass from hand to hand was not shaken in any way at the hearing.[2] The testimony of the other officers relating to these events supports Steverson's testimony. There is no testimony at all that anyone made any promises whatever to Williams or made any suggestion to him other than to attempt to make an actual purchase of drugs from Sostre. Safeguards were taken to make sure that

if Williams purchased drugs from Sostre, the purchase could be independently verified. He was searched, Trooper Steverson was close at hand to observe the proceedings and the other officers were across the street to verify whatever events took place in the store.

In petitioner's original application to this court for habeas corpus relief, he alleged that there was a "conspiracy" between police officers and Arto Williams to "frame" him. Counsel for petitioner has not adopted this position. The court notes that petitioner's allegation of a conspiracy is not supported in any way by the evidence. Although an attempt was made to show a close working relationship between Williams and the police officers during the Sostre investigation, petitioner failed to reveal any improper activity on the part of any of the officers to induce Williams' trial testimony. Counsel for the petitioner agree that there was no attempt made by the police to persuade Williams to testify falsely against Sostre. During the hearing, Williams was asked on cross-examination:

> Q. All right. I will rephrase it for you, Mr. Williams. When was the first time, - I believe you testified it was at a meeting of an organization called TUUMEST [sic].
>
> A. That's correct.
>
> Q. That you revealed your present story, when did that occur?
>
> A. I think it was in '71.
>
> Q. 1971?
>
> A. I'm not sure, but it could be.

Q. And that was the first time that you revealed that you had lied on the stand prior to that?

A. Yes.

Q. To anybody?

A. To anybody.

Q. Police officers?

A. To anyone. (Tr. at 40.)

On further cross-examination, Williams was asked:

Q. What kind of a frame were you asked to develop with Mr. Sostre, Mr. Williams?

MR. CHEVIGNY: I object, your Honor. There is no testimony he was asked to develop a frame. (Tr. at 143.)

Although counsel for petitioner do not argue that Williams and the police officers conspired to "frame" Sostre, counsel do argue that Williams' actions made him an agent of the state. The argument continues that since the state knowingly used false testimony at trial, the writ should issue. Because the court finds that Williams' testimony at the hearing was not believable, it is not necessary to determine whether he was an agent of the state. Based on all of the facts contained in the record before the court, the writ is denied.

Certificate of probable cause and per-

mission to appeal in forma pauperis are granted. Petitioner may file a notice of appeal with the Clerk of the United States District Court, United States Court House, Buffalo, New York, without the payment of filing fees.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: March 15, 1974

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1 On October 31, 1973 the Supreme Court, Appellate Division, Fourth Department, affirmed petitioner's conviction without opinion, but modified the judgment to provide that the sentences run concurrently. On January 16, 1974 petitioner's application for leave to appeal from that Appellate Division decision to the Court of Appeals of New York State was denied.

2 While Officer Steverson's testimony at the hearing before this court was entirely consistent with his testimony at Sostre's trial, the court notes that on cross-examination at the hearing Steverson stated that in his affidavit sworn to on July 17, 1967, he made no mention of seeing a glassine envelope. He said in that affidavit: "He [Sostre] then extended his hand to the informant and the informant extended his hand to meet Sostre's." (Hearing Tr. at 222.)